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16. Abstract

This study reviewed each State statute regarding drug-impaired driving as of December 2008. There is a high degree of variability across the States in the ways they approach drug-impaired driving. Current laws in many States contain provisions making it difficult to identify, prosecute, or convict drug-impaired drivers.

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Executive Summary

There is a growing body of scientific evidence concerning the use of illegal drugs and driving (Drummer et al., 2003; European Monitoring Centre for Drugs and Drug Addiction [EMCDDA], 2007; Jones, Shinar, & Walsh, 2003; Mørland, 2000; Walsh, de Gier, Christopherson, & Verstraete, 2004). An analysis of the U.S. National Survey on Drug Use and Health (2007) estimates that nearly 5% (more than 10 million) of licensed drivers in the United States drove under the influence of an illicit drug during the previous year. The highest drugged-driving rates reported were among the young, least-experienced drivers. Despite the mounting research evidence that driving under the influence of drugs (other than alcohol) is common, there is minimal public awareness of this fact, and drugged drivers are less frequently detected, prosecuted, or referred to treatment when compared with drunk drivers.

To address the problem of impaired driving due to drugs other than alcohol, State legislatures have added statutory language proscribing operation of motor vehicles "under the influence'" or "while impaired" (or a variety of similar terms) by "illegal drugs," or impairing substances, often referencing the Federal controlled substances list, or specific drug classes (e.g., amphetamines, central nervous system depressants).

Many States have supported the establishment of Drug Recognition and Classification (DEC) programs within their State and local police, and the training of special Drug Recognition Experts (DREs). In addition, as a result of the overall prevalence of drug use in the United States, and the growing concern regarding the traffic safety implications of illegal drug use by drivers, 17 States have taken the initiative to enact driving under the influence of drugs (DUID) per se laws (Arizona, Delaware, Georgia, Iowa, Illinois, Indiana, Michigan, Minnesota, North Carolina, Nevada, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, and Wisconsin). Neither of these two strategic approaches to the problem of drugged driving (i.e., DEC and per se statutes) have been widely evaluated for their relative effectiveness.

In an effort to examine current public policy on drugged driving across the United States, NHTSA has commissioned a review of each State statute regarding drugged driving, and contacted State officials to discuss these laws. This document provides a comprehensive current analysis of State statutes regarding DUID as of December 2008.

The good news contained in this document is that the majority of State DUID statutes contain provisions for a substance abuse clinical evaluation, and education/treatment services for those convicted of drugged driving. The bad news is that the current laws in many States include provisions that make it difficult to identify, prosecute, or convict drugged drivers.

There are three principal types of drugged-driving laws:

1) Statutes that require drugs to render a driver **"incapable"** of driving safely;
2) Statutes requiring that the drug impair the driver's ability to operate safely or require a driver to be **"under the influence** or affected by an intoxicating drug"; and
3) **"Per se"** statutes that make it a criminal offense to have a drug or metabolite in one's body/body fluids while operating a motor vehicle (often referred to as "zero tolerance" laws).

In the first two types of statutes, which are the most prevalent in the United States, the State must prove that "the drug" caused the impaired driving, which is a technically complicated and difficult task. There was some evidence that stakeholders (e.g., law enforcement agencies, judges, and prosecutors) feel that the "per se" type statutes facilitate the prosecution, conviction, and potential treatment of drugged-driver offenders (Lacey, Brainard, & Snitow, under review). The 17 States with per se type statutes cover roughly 40% of all licensed drivers in the United States.

Overall, the State-by-State analysis indicates there is a lack of uniformity or consistency in the way the States approach drugged drivers. The current DUID statutes in many States do not support or encourage enforcement and prosecution of driving under the influence of drugs other than alcohol. There is a need for national leadership to develop model statutes and to strongly encourage the States to modify their laws to be more effective.

Driving Under the Influence of Drugs Laws in the United States

Introduction

Under the Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users (SAFETEA-LU), Public Law 109-59, Section 2013, the U.S. Department of Transportation is required to submit a report to Congress covering varying aspects of driving under the influence of drugs. Among the requirements of the report is a description and assessment of current State and Federal laws relating to drug-impaired driving. The purpose of this document is to convey that information.

The laws in all 50 States, the District of Columbia, and Puerto Rico were reviewed and summary statements of the sections were developed of each State's impaired driving statute pertaining to driving under the influence of drugs other than alcohol. The summary statements were reviewed at the State level, typically by the States' Traffic Safety Resource Prosecutor (TSRP) for accuracy.

The statutory information in this report is current as of December 2008. The main sources consulted in the drafting of this report were the Codified Laws, the Codes and Statutes of the individual States, Puerto Rico, and the District of Columbia, and the State Highway Safety Offices or law enforcement agencies. This report is not intended to be a reference to be relied upon for official legal citation. Please consult the most recent official statutes in each individual State for official citation.

The abbreviation DUI is used for any drunk- or drugged-driving offense although this report targets only statutes related to drugged driving. References to any alcohol-related DUI are limited. DUID refers specifically to drugged driving offenses. DRE refers to both drug recognition evaluations and Drug Recognition Experts (law enforcement officers specially trained to perform drug recognition evaluations).

General Comparisons and Contrasts Among the States

DUID Statutes

DUID statutes are predominantly found in the Transportation or Motor Vehicle Codes or Titles of the respective States' Codes or Statutes. In only 2 States (Idaho and Texas) can one find the State's DUID statutes in the Penal Code or Criminal Title.

All the States with the exception of Texas and New York use the phrase "under the influence" in their DUID statutes. Several States have gone on to define the standard that constitutes "under the influence" within the body of the statute. Fourteen States (Alabama, Arkansas, Illinois, Kansas, Nevada, Maryland, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Vermont, Wisconsin, and Wyoming) set the standard at "incapacity" (i.e., the influence of the drug "renders the driver incapable of driving safely"). All these States placed this standard in the language of the DUID statute. Incapacity to drive safely is thus linked to the drug ingested and the prosecutor must show a connection between drug ingestion and the incapacity of the driver.

Other States (Arizona, Florida, Hawaii, Indiana, Kentucky, Montana, South Carolina, and Virginia) use the standard of impairment to define "under the influence" so that the influence is such that the driver's abilities are impaired. This suggests the requirement of a less stringent effect on the driver than one that renders the driver incapable of driving safely; nevertheless, the prosecutor still must prove that the impairment is directly related to the drug ingested.

Texas sets a standard of intoxication, which it defines as "not having the normal use of mental or physical faculties" by reason of ingestion of a drug. Texas also makes it illegal for chemically dependent people who are a danger to themselves or for those who are addicted to a controlled substance or another drug which renders that person incapable of driving, to receive a driver's license. This has the effect of prohibiting these people from driving altogether, because it is illegal for them to drive a vehicle without a license.

There are a total of 17 States that have variations of zero-tolerance type legislation with regard to DUID. In 7 per se States (Arizona, Delaware, Georgia, Indiana, Minnesota, Pennsylvania, and Utah), it is illegal to have any amount of a prohibited drug or its metabolite in the body while operating a motor vehicle (N.B., the Minnesota law specifically exempts marijuana). In 5 States (Illinois, Iowa, Michigan, Rhode Island, and Wisconsin,) it is illegal to have any amount of a prohibited drug in the body while operating a motor vehicle. In 3 States (Nevada, Ohio, and Virginia), it is illegal to have specified amounts of specified prohibited drugs in the body while operating a motor vehicle. Two States (North Carolina and South Dakota) make it illegal for any people under age 21 to drive with any amount of a prohibited drug or substance in their bodies.

Five States (California, Colorado, Idaho, Kansas, and West Virginia) make it illegal for any drug addict or habitual user of drugs to drive a vehicle in their States.

A number of States use the standard of impairment to construct a separate offense so that, in these States, a person can be charged with "driving under the influence," with "impaired driving," or both. New York also uses the term "impaired driving," but that is the only offense with which a person may be charged in New York. It does not have a statute relating to "under the influence."

In addition to its "under the influence" statute, the State of Washington has a "negligent driving" statute that prohibits the negligent operation of a vehicle if it "endangers or is likely to endanger any person or property, and (the driver) exhibits the effects of having consumed an illegal drug."

Only 2 States (Hawaii and New York) have DUID statutes separate from their DUI-alcohol statutes. In all the other States, a driver violates a DUI statute if he/she drives under the influence of alcohol, drugs, or a combination of alcohol and drugs. The use of the word "or" in all of these statutes infers that it does not matter what substance is influencing the driver, or that the driver is under the influence of a combination of substances (e.g., alcohol combined with other drugs). Under these States' laws, the violation is the same, as are the ensuing penalties. The one exception found is the State of Washington, where the DUID language is included in the overall DUI statute, but different penalties attach where there has been only drug use, as opposed to alcohol use or a combination of alcohol and drug use.

Defenses Available

A total of 20 States (Alabama, Arizona, Arkansas, Delaware, Georgia (with one exception), Idaho, Illinois, Kansas, Kentucky, Montana, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, and West Virginia) and Puerto Rico specifically disallow legal entitlement to use the drug as a defense to a DUID charge. Maryland allows for limited use of legal entitlement as a defense in two circumstances: (1) where the defendant was unaware that the drug would render him/her incapable of driving safely, or (2) where the defendant was legally entitled to use a controlled substance. North Dakota will allow legal entitlement to be used as a defense if the drug was used only as directed or cautioned by an attending physician or other practitioner who legally prescribed or dispensed the drug to the defendant.

Use of a drug pursuant to a valid prescription and/or according to directions is a defense to a DUID charge in several States (Arizona, Indiana, Iowa, Minnesota, and North Carolina). In the State of Washington, use of a drug pursuant to a valid prescription is a defense to a charge of "negligent driving." In North Carolina, it is a defense to a per se charge if the person under 21 lawfully obtained the substance and was using it in "therapeutically appropriate amounts" at the time of the offense. Georgia will allow the defense of legal entitlement to a charge under its per se statute unless the driver is rendered incapable of driving safely by the drug use. In Utah, it is an affirmative defense to a charge under its per se statute that the controlled substance was involuntarily ingested; or was prescribed by a practitioner for use by the defendant; or was otherwise legally ingested.

Wisconsin allows a defense to a charge of DUID if the driver proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic precursors, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol.

Implied Consent Law

All but 5 States (Alabama, Alaska, Massachusetts, New Jersey, and West Virginia) extend their implied consent (to provide a specimen if requested by law enforcement) laws to instances of DUID. However, both Alabama and Alaska have provisions for compulsory testing in certain circumstances in crashes involving serious injury or death. Of those 45 States (plus the District of Columbia and Puerto Rico) that do extend implied consent laws to drugged driving, 9 States (Arkansas, Indiana, Louisiana, Maryland, Minnesota, Nebraska, New Mexico, Ohio, and Rhode Island) have taken an additional step by providing criminal penalties for a refusal to submit to a test under the implied consent law. Alaska also provides for criminal sanctions under its limited circumstances of compelling a test. New Mexico has a separate statute specifically denoting a refusal to test as a separate crime. Two other States (Kentucky and Maine) do not provide for criminal penalties, but use a refusal to submit to a test as an enhancement of penalties should the driver be convicted of DUID. Nevada does not have any criminal sanctions for refusal to test; however, upon refusal, the requesting officer shall seize the license of the driver and arrest him/her for DUI.

Twenty-eight States (Alaska, California, Delaware, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Washington, Wisconsin and Wyoming) and the District of Columbia and Puerto Rico, permit the forced taking of a specimen for a chemical test over the objection of a driver. In the majority of cases, the taking of a specimen without consent is limited to circumstances where there has been a crash involving serious injury or death and there is probable cause to believe that the driver is driving under the influence of a drug. Of those 28 States, New Mexico, North Carolina, Pennsylvania, and Vermont consider such action a "search," and therefore, require either a search warrant or the exigent circumstances that would permit a warrantless search. Wisconsin, too, will allow a forced test only through the use of "lawful means."

Hawaii is the only State extending its implied consent law to cases of drugged driving that does not allow evidence of a refusal to submit to a test to be admitted into evidence in any case against the defendant driver. Maryland will allow such evidence only if it is "material and relevant" to issues related to the DUI offense. Michigan admits such evidence only to show that a test had been requested. Rhode Island will allow evidence that the defendant refused to submit to the test only if the defendant elects to testify. Virginia allows the introduction of such evidence only for purposes of rebuttal. Wisconsin will hold such evidence to be admissible only if its implied consent provisions were followed correctly. All the other States and the District of Columbia extend their implied consent laws to DUID and permit evidence of a refusal is admissible in criminal cases. Several States also allow evidence of "refusal to test" to be admitted in any civil case against the defendant driver.

Under the implied consent provisions, most State statutes stipulate the type of specimen that law enforcement officers are authorized to collect. Thirty-four States permit blood and/or urine. Eight States (Maryland, Montana, New Mexico, Rhode Island, Vermont, Virginia, Texas, and Washington) allow only blood. Six States permit saliva (Colorado, Missouri, New York, North Dakota, Oklahoma, and Utah). Eight States (Alabama, Arizona, Georgia, Indiana, Kansas, Louisiana, North Carolina, and South Dakota) and Puerto Rico permit "other bodily substances." Because the implied consent does not extend to DUID, there are no provisions for collecting a specimen to test for drugs in three States (Massachusetts, New Jersey, and West Virginia).

Sanctions

It is difficult to compile a complete overview of sanctions among the States for either refusal to submit to a test or upon conviction for DUID. Some States provide for relatively light sentences for first time offenses; others impose severe sanctions/penalties on first-time offenders. A few States have made a second or third offense a felony; others do not reach felony status until a fourth or subsequent offense has been committed. As indicated in the discussion about implied consent laws, a few States attach criminal penalties to a refusal to submit to a test; most of the others provide only for administrative license suspension and/or revocation. Again, the time periods for such suspensions/revocations run the gamut. For both refusals and convictions, some States provide for mandatory sentencing with no exceptions, some provide for mandatory sentencing with exceptions, and some have no mandatory requirements.

Penalties in addition to fines and incarceration also vary widely among States. Many States employ community service, house arrest, electronic monitoring, work release, restitution, and the assessment of costs and fees to supplement the court's ability to sanction offenders.

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